United States Court of Appeals

for the Second Circuit

APPELLEE’S BRIEF

75-1393

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To be argued by
HOWARD S. SUSSMAN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1393

UNITED STATES OF AMERICA,
Appellee,

—against—

JOE TRUMAN BOYD, ERNEST DARWIN GOODLOE, ROBERT E. FORD, ERNEST R. MULLENAX and M. S. KNISELY,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

ROBERT B. FISKE, JR.,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

HOWARD S. SUSSMAN,
JOHN C. SABETTA,
Assistant United States Attorneys,
Of Counsel.

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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Joe Truman Boyd ("Boyd"), Ernest Darwin Goodloe ("Goodloe"), Robert E. Ford ("Ford"), Ernest R. Mullenax ("Mullenax") and M. S. Knisely ("Knisely") appeal from judgments of conviction entered December 2, 1975, in the United States District Court for the Southern District of New York, after a trial before Honorable Milton Pollack, United States District Judge, and a jury.

Indictment 75 Cr. 140, filed February 10, 1975, charged 16 defendants in each of its 53 counts (A. 16-29).* Indictment 75 Cr. 346, filed April 4, 1975, made

* "A." refers to the consecutively numbered "Appellant's Appendix" and "Appellant Robert E. Ford's Supplemental Appendix", filed by Mullenax and Ford, respectively; "AA." refers to the

[Footnote continued on following page]

substantially identical charges in 53 counts against an additional defendant, Michael Gardner ("Gardner"). The two indictments were consolidated for trial.

Count 1 of both indictments charges a conspiracy in violation of 18 U.S.C. § 371, arising out of the defendants' activities with respect to Select Enterprises, Inc. ("Select"). It alleges that the conspirators sought "to obtain control of a 'shell' corporation without any substantial assets, inflate artificially its price, and sell, pledge and distribute the shares at enormous profits to members of the public without providing material information required to be furnished by law" (A. 18), by means of violations of the mail, wire and securities fraud statutes (18 U.S.C. §§ 1341 and 1343; 15 U.S.C. § 77q), the sale of unregistered securities (15 U.S.C. § 77e), and the making of false statements to the Securities and Exchange Commission ("SEC") (18 U.S.C. § 1001). The remaining 52 counts charge substantive crimes of mail and wire fraud (Counts 2-28), securities fraud (Counts 29-40), sale of unregistered securities (Counts 41-51), and false statements to the SEC (Counts 52 and 53).

Trial commenced September 29, 1975 (Tr. 1). The jury returned verdicts of guilty against Boyd, Goodloe and Mullenax * on October 18 (Tr. 2639-2643) and against Ford and Knisely on October 20, 1975 (Tr. 2668-2669). Three defendants—James Calvin Joiner ("Joiner"), Alan Segal ("Segal") and John Wells

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"Appellant's Appendix" filed by Goodloe; "Tr." refers to the trial transcript; "GX" refers to Government's Exhibits; and "DX" refers to Exhibits of the indicated defendant.

Emphasis throughout this Brief is added unless otherwise indicated.

* The jury acquitted Mullenax on Counts 52 and 53 (Tr. 2643).

("Wells")—pleaded guilty before trial and testified for the Government. The cases of two defendants—Selwyn Weber ("Weber") and Howard L. Brookshire ("Brookshire")—were severed, Brookshire's on his motion before trial (A. 1147) and Weber's upon his illness during trial (Tr. 1820). The remaining seven defendants were acquitted.*

On December 2, 1975, Judge Pollack sentenced Boyd, Goodloe and Ford to five years' imprisonment each (A. 13); Mullenax to two years' imprisonment, of which six months are to be spent in confinement and the balance suspended, plus two years' probation, and a $10,000 committed fine on Count 1 (A. 14); and Knisely to five years' imprisonment, of which two months are to be spent in confinement and the balance suspended, plus two years' probation (A. 13). All appellants are enlarged on bail pending this appeal.**

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* They are: Emerson F. Titlow ("Titlow"), William Wayne Barnett ("Barnett"), Marvin J. Rappaport ("Rappaport"), Stanley Schleger ("Schleger"), Edward Vanasco ("Vanasco") and Roger Bissett ("Bissett") in Indictment 75 Cr. 140, and Gardner.

** On December 5, 1975, Judge Pollack sentenced Joiner to two years' imprisonment and a $2,500 fine and Wells to two years probation (A. 14). On January 30, 1976, Judge Pollack sentenced Segal to five years' imprisonment to run concurrently with his three-year sentence on his conviction on Indictment 74 Cr. 908 (AA. 13), which related to his 1969-1970 manipulation of an over-the-counter stock called Pioneer Development Corp. ("Pioneer") (see Tr. 88, 94). *United States* v. *Finkelstein*, 526 F.2d 517 (2d Cir. 1975). Joiner and Segal are presently serving their sentences.

Statement of Facts

A. Synopsis

The government's evidence, presented through 39 witnesses * and approximately 300 documentary exhibits, established overwhelmingly an elaborate nation-wide conspiracy which had many facets but one single overriding and unifying purpose: the bilking of the public by the use of Select stock to which a fraudulent appearance of value had been given. All the appellants acted to contribute to the accomplishment of that purpose.

The conspiracy began in October 1969, when Boyd and Joiner first discussed how to "make some money with" a shell corporation (Tr. 966). After this discussion, Boyd located and in January 1970 bought Goldfield Candelaria Cooperative Mining Company, Inc. ("Goldfield"), the dormant pre-1933 Nevada shell corporation which became Select. Meanwhile, Goodloe and Ford were engaged in acquiring three purported assets for Select—New Mexico mica mines, Texas oil and gas leases, and barren, desert California land—which were reflected at fraudulently inflated values in three fraudulent Select balance sheets: the first two assets in balance sheets dated January 27 and as of February 20, 1970, respectively, and all three assets in a balance sheet dated as of March 5 and certified under date of March 28, 1970.

With the fraudulent January 27 balance sheet, accompanied by an accountant's letter and a fraudulent report of even date signed by Knisely as Select's president (one of many fraudulent documents Knisely signed as a front man), Segal, whom Joiner had located for Boyd,

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* Judge Pollack struck the testimony of an additional Government witness, Bruce Bandes (Tr. 612-619).

began at Boyd's behest the manipulation of Select stock to a price exceeding $15 per share in the New York City over-the-counter securities market. Subsequently, the brokers who had been trading Select stock for Segal delivered the January 27 documents to the SEC.

On February 20, 1970, the SEC began an inquiry into Select. This led to a cover-up in which the conspirators prepared a fraudulent due diligence file for the brokers who had been trading Select stock, fabricated and back-dated many documents to provide substantiation for the fraudulent January 27 balance sheet, and suborned and committed perjury before the SEC, both in Texas and in New York. On March 9, Boyd appeared before the SEC in Fort Worth and provided many documents, including Select's second fraudulent balance sheet, dated as of February 20, 1970.

A certified balance sheet was finally obtained at the end of March, and given by Boyd to the SEC on April 6, mid-way in an April 2-11 trading suspension the SEC had ordered. As the SEC investigation continued throughout April, the conspirators suborned and committed further perjury before the SEC, until, towards the end of April, they obtained a new team of market manipulators, including Wells in New York City. Mullenax, who had by then joined the conspiracy, thereafter acted as front man in borrowing $90,000 from lending institutions in Alabama and Kansas against Select stock by the use of the fraudulent certified balance sheet and other fraudulent publicity.

B. The Government's Case

1. The early meetings between Boyd and Joiner

In October 1969, Boyd met Joiner at Joiner's apartment in Lubbock, Texas, and asked him where they could get a shell corporation "a man could make some money with" (Tr. 966).* Joiner replied that co-conspirator Bernie Acton ("Acton"), with whom he was associated in a corporation called Advance Resources, might be able to help because Acton "had a company that was over the counter stock" called Pioneer (Tr. 966-967).** Joiner also told Boyd that because of his recent felony conviction (see Tr. 964-965) Acton had asked him "to get out as an officer" of Advance Resources and to put his stock "in another fellow's name" (Tr. 967). At a second meeting sometime thereafter, Boyd reported to Joiner that he had found some shells, including "one in Reno" which "was an old 1915 shell corporation, grandpappy class, that had all the stock intact" (Tr. 967), could be purchased for $40,000 and "looked like it would be good if we could get a hold of it" (Tr. 968). This was Goldfield, which became Select.

2. Boyd meets Segal

Having located a shell, Boyd and Joiner next made arrangements to meet Acton's market manipulator, whose name they did not yet know. On or about January 5, 1970, together with Acton and co-conspirator Bruce Baker ("Baker"), they went to Brookshire's bank in Atoka, Oklahoma (the "Atoka Bank"), and arranged to

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* Also present was co-conspirator Sam Hale ("Hale").

** See *supra*, p. 3, n. ** .

borrow $25,000 secured by Pioneer stock provided by Acton (Tr. 968-969). On the return trip, Acton for the first time identified Segal as his market maker (Tr. 969). Thereafter the loan was consummated, with Acton getting $7,000 and Boyd $8,500 of the proceeds (Tr. 969-970, 972-973), after which Acton introduced Boyd to Segal (Tr. 92-93).

Boyd met Segal on January 13, 1970, in Reno, Nevada. At the first of two meetings between them that day, Boyd told Segal "about a shell corporation he was acquiring" and "was going to call Select Enterprises" (Tr. 92), and asked Segal if he "could open the stock in New York over-the-counter at a $15 price" which would permit the stock to be used both as collateral for bank loans and to complete some acquisitions which had been predicated on its having that value (Tr. 93). Segal replied that to do so he needed "a complete due diligence file", "certified financial statements" and "a complete and thorough package" with the various properties Boyd talked about "deeded into Select Enterprises" (Tr. 94). Because of the "back-dooring" he had encountered in the Pioneer manipulation, Segal also "wanted complete access to the transfer agent" and "a copy of every transaction that took place . . . through the transfer agent" so that he would have "as much control as [he] possibly could have to see that there would be no back-dooring of the stock" (Tr. 94). Boyd replied that back-dooring could not occur because he controlled the entire body of outstanding stock, which he would prove later that day (Tr. 94-95).

Boyd met Segal and Acton again later on January 13, this time accompanied by Joiner whom he introduced to Segal as his associate (Tr. 95-97, 973), and delivered to Segal Bissett's January 13 opinion letter (GX 6) which states, in part, that Bissett's office has "share certificates in the total amount of 1,156,603 shares . . . representing the total issued and outstanding shares" of Goldfield (Tr.

97, 974-975). Being satisfied that Boyd had "the entire block of stock" (Tr. 99), Segal reiterated the document requirements he had stated at the earlier meeting and said he would try to make a $15 per share market after Boyd delivered 50,000 Select shares to him, 25,000 in the name of his secretary, Francine Zahl, and 25,000 in the name of his mother-in-law, Florence Glantz (Tr. 99-100, 974-975).

3. Boyd acquires Select

Boyd signed "Escrow Instructions" dated January 13, 1970 (GX 337, pp. 2-3), which contemplated his acquisition of Goldfield from Titlow by February 1 for $40,000, provided, among other things, that Goldfield had been reinstated, its name changed to Select and its authorized capital stock increased to 10,000,000 shares. Boyd showed Joiner the instructions after the January 13 meetings with Segal, and told Joiner he would arrange to obtain the $40,000 purchase price through Brookshire at the Atoka Bank, which he thereafter did by means of a note signed by Fred Bannowsky ("Bannowsky"), secured by stock of Underwriters Investment Company (Tr. 977-978; GX 29, pp. 6, 9-10).*

On January 20, 1970, a Certificate for Revival of Charter (GX 6C) was filed, possibly by Boyd himself

* GX 29 is a transcript of Boyd's testimony before the Fort Worth Regional Office of the SEC on April 17, 1970. There were received as part of the Government's case (see Tr. 1097-1099, 1226-1228, 1380-1381, 1385-1388, 1542, 1707, 1709-1710, 2110-2113) eight transcripts of testimony before the SEC, together with the exhibits marked during the testimony so transcribed, *viz.*: GX 22 (Knisely on April 16, 1970); GX 28 (Barnett on April 30, 1970); GX 27 and 29 (Boyd on March 9 and April 17, 1970, respectively); GX 94 (Brookshire on April 15, 1970); GX 160 (Schleger on April 17, 1970, in New York); GX 311 (Titlow on May 1, 1970, in New York); and GX 327 (Goodloe on April 22, 1970).

(see Tr. 979-980), Goldfield was revived and its name changed to Select (GX 42, 43, 321 and 322). In the interim, the other amendments contemplated by the January 13 "Escrow Instructions" had been accomplished (Tr. 684-685; GX 44, 44B and 45), and, on January 21, 1970, Boyd delivered the purchase price and received the 1,156,603 Goldfield shares (GX 332, GX 337, pp. 1 and 6).

The January 20 Goldfield Certificate for Revival (GX 6C) lists eleven purported shareholders of Goldfield, ten of whom it recites to own 110,000 shares each and the eleventh 56,603. One of the ten, Titlow's secretary Christine Smith, testified that she "did not own those shares at all" but instead was a "nominee only" (Tr. 687). She also testified that the Goldfield certificates had been ordered and received from the printer in the late fall of 1969 (Tr. 682-684), which the receipt for them confirms (GX 72). The fraudulent nature of Goldfield is further demonstrated by the receipt showing its corporate seal was ordered January 13, 1970 (GX 73).

4. Select issues its first stock

Shortly after the January 13 meetings with Segal, Boyd told Joiner he had "good people, he had known for a good long time" who would "represent" Select. These front men were to be Knisely as President, Weber as Secretary, and R. B. Goodloe ("Parker Goodloe"), brother of defendant Goodloe, as Vice President (Tr. 976; 1394). Boyd told Joiner he was going to get signature samples from Knisely and Weber so they could be "placed on the stock" and "the stock could be printed" (Tr. 980), which he did in time for the certificates to be ordered January 20 and the first 500 delivered in Reno on January 20 or 22, 1970 (Tr. 688, 690; GX 74).

On January 22, 1970, in Reno, 220,000 Goldfield shares were transferred to Select shares (Tr. 690; GX 18, 19,

54, 270, 271): 50,000 shares to Florence Glantz, 50,000 to Francini (*sic*) Zahl, 10,000 each to Bannowsky, Joiner, Knisely, Brookshire, Parker Goodloe, Goodloe, Weber, W. C. Chapel ("Chapel") and H. T. Hanson ("Hanson"), and 30,000 to Boyd (GX 10, pp. 11-15).* This transfer of 100,000 shares to Segal's nominees and 120,000 to Boyd and his group, which doubles the numbers agreed to between Boyd and Segal in Reno some ten days previously (*supra*, p. 8), left outstanding 936,603 Goldfield shares from the 1,156,603 Boyd had received from Titlow.

5. The January 22 Select board of directors meeting

On January 22, the same day Select's first shares were issued in Reno, there was held, according to its minutes (GX 9, pp. 1-25), a meeting of Select's Board of Directors. The several Knisely signatures in the minutes and other papers for that meeting appear to be genuine, but the Parker Goodloe signatures are not (Tr. 1395-1396). Parker Goodloe maintained at trial that in a telephone conversation of January 22, 1970, he had authorized Boyd to make him a Select officer and to sign his name (Tr. 1396, 1402-1403, 1448), even though he had testified to the contrary in the Grand Jury investigation (Tr. 1400-1402) and, in April 1970, before a State securities investigator in Texas (Tr. 1403-1407).

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* The transfer records provide a purported list of stockholders as of January 12, 1970 (GX 10, pp. 3-10), from five of whom the 220,000 shares transferred January 22 purport to have come (*id.*, pp. 10 and 11). The January 12 list is remarkable for the recurring alphabetical arrangement of the names which appear on it. It is to be compared with the notarized Goldfield Certificate of Revival (GX 6C), which lists only eleven Goldfield stockholders as of January 13, not one of whom appears in the January 12 list. The transfer records contain no indication of transfer from any of the January 12 purported stockholders to any of the January 13 purported stockholders.

At the January 22 Board of Directors meeting, according to the minutes, a miscellany of formal business was transacted (GX 9, pp. 1-25). Significantly, however, the minutes for the January 22 meeting do not recite any discussion or record any resolution concerning Select's acquisition of assets or issuance of stock. Those things are recited to have been dealt with at a purported meeting of January 23, the minutes for which Knisely signed (GX 9, pp. 26-30),* where 423,334 shares of "unregistered" and "restricted" Select stock were authorized to be issued to B. H. Grube ("Grube"), Goodloe, and R. C. Maxson ("Maxson"), in exchange for four assets purported to have been transferred by them, respectively, to Select (*id.*, p. 28).

Three of the assets involved—New Mexico mica mines from Goodloe's company, C. A. Morris & Company, Inc. ("C. A. Morris"); Midland, Texas, real estate from Grube's companies, South Midland Development Corporation and South Midland Commercial Corporation (the "Grube property"); and Texas oil and gas leases from Goodloe—are listed as Select assets on Select's Balance Sheet dated January 27, 1970 (GX 1, p. 3). These three assets, plus a fourth—the Patio Building in Midland, Texas, from Maxson—are included as Select assets on Select's pro-forma Balance Sheet dated as of February 20, 1970 (GX 2, p. 2).** Ford prepared conveyances signed by Goodloe dated January 23, 1970, and covering the New Mexico mica mines and the Texas oil and gas leases, as well as opinions on those properties dated Janu-

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* As with the January 22 minutes, Parker Goodloe's signature in the purported January 23 minutes was not genuine but was, according to his trial testimony, authorized.

** All four assets, plus a fifth for which Goodloe and Ford negotiated—barren, desert California land reflected at a value of $25 million—are included as Select assets on its Balance Sheet dated as of March 5, 1970, and certified under date of March 28, 1970 (GX 3, pp. 2-3).

ary 26, 1970, all of which the proof showed to have been signed much later and back-dated as part of the cover-up (*infra*, pp. 15-17, 18-20). Others prepared and backdated as part of the cover-up documents dealing with the Grube property and the Patio Building (*infra*, pp. 17-18, 22-23). As a further part of the cover-up, the stock purportedly issued in exchange for these assets was shown in the transfer agent's records (GX 10, p. 16) to have been issued on January 25, 1970, a Sunday; in fact, it was not issued until February 24 (see *id.*, pp. 16 and 24; Tr. 690-692; *infra*, pp. 25-26). This backdating effort was directed towards substantiating the false January 27 Balance Sheet on which trading in Select stock had been based (*infra*, p. 14).

6. Boyd and Segal lock up the stock

On January 26, 1970, Boyd flew to New York City and there hand-delivered to Segal the 100,000 Francini Zahl and Florence Glantz shares and the 936,603 Goldfield shares (*supra*, pp. 8, 10; Tr. 104, 105-106, 108-110, 142; GX 18, 19 and 346). Segal's secretary, Francine Zahl, accompanied Boyd to a New York bank where they locked the 936,603 Goldfield shares into a safe deposit box under the joint control of Boyd and Segal, as reflected in the receipt for those shares which she and Boyd signed (Tr. 116-117, 575-576; GX 25 and 346).

Boyd also brought with him to New York on January 26 and gave to Segal (Tr. 111, 113, 114) a January 20, 1970 pro-forma balance sheet for C. A. Morris (GX 1G) and a report on its mica mines (GX 34A), as well as the Goldfield revival and name change certificates (GX 42 and 43), and told Segal that the mica mines "were already in Select Enterprises" (Tr. 111). Segal replied that before he could "even begin to open up the stock in New York" he needed documentation "reflecting that it belongs to Select Enterprises" (*ibid.*) including "the

financials certified" so that he "could present a due diligence file to the broker" he selected (Tr. 118). Boyd promised to provide that "in a couple of days" (Tr. 112, 118-119). Significantly, Boyd did not show Segal in New York on January 26 any contract, conveyance or opinion letter for the C. A. Morris mica mines, the Grube property, the Texas oil and gas leases, or the Patio Building.

7. The January 27 Select documents Boyd delivered to Segal

Boyd returned to Texas and unsuccessfully sought Joiner's help in obtaining certified financial statements for Select (Tr. 985). On January 27, Weber took Boyd to Bill G. Elms ("Elms"), an accountant in Weber's building in Odessa, Texas (Tr. 1342).

Boyd and Weber told Elms about "a proposed merger" between Select "and a South Midland Development Company and another corporation" (Tr. 1343), presumably C. A. Morris (see GX 377; Tr. 1346-1347), and they discussed a "possible certified audit of financial statements for those companies" (Tr. 1343). "It was not determined who would do that audit work" (*ibid.*), however, and when Weber later that day asked Elms for a letter "stating that our firm had been engaged to do this accounting work" (Tr. 1350), Elms carefully left "the scope of our engagement" for future discussion and explicitly stated that "[a]t this point it is not determinable as to the amount of work we will be required to do or expected to do for your company" (GX 1, p. 1). Elms' letter was attached by the conspirators to a January 27 letter from Knisely to Select's Board of Directors (GX 1, p. 2) and Select's January 27 Balance Sheet (GX 1, p. 3), both of which were false (*infra*, pp. 15-20).

On January 28 or 29, Boyd returned to New York and delivered to Segal the January 27 Knisely letter and

Balance Sheet with the Elms letter attached (Tr. 127-128; GX 1). He told Segal that although the Balance Sheet was not certified, Elms "is working on it diligently" and "will finally complete it" (Tr. 128). Segal used these false documents in initiating the manipulated market in Select stock, and copies of them were later delivered to the SEC in New York by the brokers to whom Segal had given them (Tr. 131-132, 145-146, 383-384, 447-448, 456-457, 519, 596-597, 628; GX 1B, 1C, 1D, 1H, 1L).

Having delivered the January 27 documents to Segal, Boyd returned to Texas where, on January 30, he met Joiner at a cafe in LaMesa (Tr. 981; GX 357). There Joiner delivered to Boyd checks for $11,000 of the $22,500 proceeds of a January 29 loan on Select stock he had had Baker and Hale get at the Atoka Bank at Boyd's request (Tr. 980-984; GX 357, 371), and Boyd gave Joiner a status report. Boyd told Joiner "about some acquisitions that he was working on", mentioned "Mr. Grube's property in Midland", some "oil property" and "the Mica property in New Mexico", and said that he was "on the train with Mr. Maxson on the Pateo (*sic*) deal" (Tr. 982). He showed Joiner "contracts on the oil and the mica stuff" and "a balance sheet there on the mica property" (*ibid.*), as well as the January 27 Knisely letter and Select Balance Sheet (GX 1, pp. 2, 3; Tr. 984-985), but did not show him any other documents, and in particular did not show him any conveyances of assets into Select or any contracts with Grube or Maxson (see *infra*, pp. 17-18, 22-23). Boyd also reported to Joiner that he had again talked with Segal about making a market in Select stock, that "everything was going good and we just needed to get some more acquisitions and a certified balance sheet" (Tr. 985-986).

8. The falsity of the January 27 documents

The documents (GX 1) Boyd delivered to Segal on January 28 or 29, and Segal thereafter used in creating the manipulated market in Select stock, are false in several vital respects.

The balance sheet (GX 1, p. 3) is false principally in (a) listing assets to which Select did not have title, (b) stating grossly inflated values for those assets, and (c) overstating the outstanding Select stock by 400,000 shares in anticipation of the issuance of that number of shares to acquire the assets listed.*

Knisely's letter (GX 1, p. 2) falsely states, among other things, that the balance sheet "reflect[s] recent acquisitions by your company" and adds the further falsehood that "Mr. Elms will proceed with all due haste to certify the properties that your management has here included and from time to time will issue new certified statements to reflect the financial structure of the company" (*ibid.*; Tr. 1351).

a. The New Mexico mica mines

The January 27 Balance Sheet, under "New Mexico Mining Interests," lists $19,181,257.00 for "Mines stated

* The balance sheet states there are "issued and outstanding" 1,556,603 shares of Select common stock, 400,000 more than the 1,156,603 Goldfield shares Boyd obtained from Titlow on January 21 (*supra*, p. 9). The purported January 23 minutes recite that a total of 400,001 shares were authorized in connection with the acquisitions of the three properties involved here (GX 9, p. 28; see GX 10, p. 16; *supra*, pp. 11-12). If the balance sheet had correctly reflected the stock which was purportedly authorized January 23 and issued January 25, it would have shown as outstanding a further 23,333, or 23,332, shares for a total of 1,579,937 shares, as the February 20 balance sheet did (GX 2, p. 2; *infra*, p. 26).

at net recoverable values" (GX 1, p. 3), the same value as is stated in the January 20 pro-forma C. A. Morris balance sheet Boyd gave Segal on January 26 (GX 1G). The evidence strongly supports the inference that Select did not own the mica mines at January 27. In any event, their value was at most only a minute fraction of $19 million.

(i) Title

The instrument conveying to Select the interest of C. A. Morris in the mica mines recites that it was executed by Goodloe and notarized by Ford on January 23, 1970 (GX 33); it was not filed, however, until June 3, 1970 (GX 323A). Ford's title opinion letter to Select on the mica mines, dated January 26, 1970 (GX 34), is addressed to Select at "Patio Building", an address which Select did not have until mid-February 1970 (*infra*, pp. 22-23). This is also true of Ford's January 26 title opinion letter to Select on the Texas oil and gas leases, as to which the evidence of backdating is explicit (*infra*, p. 19).

(ii) Value

Various indicia of the value of the mica mines appear in the record. For example, Goodloe told the SEC that he had acquired them in 1964 for about $10,000 (GX 327, p. 23), and transferred them to C. A. Morris which he had formed for that purpose (GX 34A, p. 7). From January to June 1965, C. A. Morris "mined, separated and sold $5,304.35 worth of mica" according to a geologist's report (*id.*, p. 8), which also states that the mines were thereafter inactive until the end of 1969 (*id.*, p. 9). Goodloe's brother, Parker Goodloe, gave estimates up to $50,000 for this period (Tr. 1434-1438) but had no docu-

mentary support for them.* He further testified that in the first four months of 1970 the mines "did not produce any mica that was sold" but did produce "one to two tons, something in that order" which was "put in bags and stored" (Tr. 1407; see Tr. 1447).

b. The Grube property

The next asset on the January 27 balance sheet is "South Midland Commercial Properties" described as "Commercial buildings and real estate at fair market value" of $1,059,970.00 (GX 1, p. 3). Again, there is clear evidence that Select did not own these properties at January 27, if it ever did, and that, regardless of title, their value was grossly overstated.

(i) Title

The Grube property was agreed to be conveyed to Select by a contract dated January 23, 1970, signed for Select in one instance by Boyd (GX 316) and in another by Knisely (GX 318).** No deed was signed prior to July 1, 1970 by the president and sole stockholder of the two conveyor corporations (Tr. 947, 949). Beyond that, the evidence raises a strong inference that even the January 23 contracts were not executed until early March.

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* He gave still higher unsupported estimates on his cross-examination.

** There was a contemporaneous side deal between Boyd and Grube (GX 317) which provided that Grube could exchange the restricted stock he received under the terms of the other contract (GX 316 and 318) for non-restricted stock which he would be free to sell "at any time the market price of such stock . . . is under $12.50" (GX 317, par. III), and to "borrow against . . . hypothecate, mortgage, pledge, assign, lien or encumber" whenever he had received "special written consent to do so" from Boyd (*id.*, par. II.B.).

The two contracts covering the Grube property were prepared by Bissett (Tr. 939), evidently in the February 9 through March 13 period covered by his March 16 invoice (GX 375, p. 3) as there is no mention of any Grube matter in his earlier invoices (GX 375, pp. 1-2). The contracts evidently were signed on March 3 in Reno, when Grube was staying at, and Boyd cashed a check at, Harrah's Hotel there (GX 389 and 356A, item 3);* Boyd did not show any Grube contract to Joiner until March 10 in Dallas (Tr. 1004).

(ii) Value

The president and sole stockholder of both corporations described the property as consisting of "approximately 170 vacant lots" of which "six or seven . . . were improved with some very second-rate property" (Tr. 947). The improvements were a "shopping center type facility" which was "partially completed in some cases" but was "largely never occupied", a small "cinderblock building about 30 by 30 square feet", and the "lumberyard" which was a "very muchly deteriorated property consisting mainly of sheetiron building and a little ramshackle office" (Tr. 948). These properties, which never "reported a gain and in many years . . . reported losses", owed about $60,000 to $70,000 in *ad valorem* taxes (*ibid.*), and the witness "would not personally have given the amount of" those taxes to purchase them (Tr. 957).

c. The Texas oil and gas leases

The third asset on the January 27 balance sheet is "Commanche County Mineral Interests" described as "Mineral Interests valued at recoverable reserve estimates" of $5,000,000.00 (GX 1, p. 3). Once again there is clear evidence that Select did not own these properties

* There was also a bill from Mapes Hotel evidencing that Grube was in Reno January 22-25, 1970 (GX 389).

at January 27, if it ever did, and that in any event their value was grossly overstated.

(i) Title

The instrument which purports to convey the Texas oil and gas leases to Select, dated January 23, 1970, signed by Goodloe as transferor and notarized by Ford's secretary, was not recorded until May 1970 (GX 162). The conveyance was ineffective in any event because Goodloe had previously agreed to convey a 50 per cent interest in the leases to James E. Peterson ("Peterson") and his brother, Donald Peterson, for $37,500 (Tr. 1519-1522, 1526-1527, 1529, 1530; GX 173 and 174). The Petersons had invested that amount, $20,000 of which they and Goodloe had borrowed from the Atoka Bank (Tr. 1526, 1528-1529; GX 169, 387 and 388), and they were unaware of any transfer to Select until Peterson checked the courthouse records in December 1970 (Tr. 1531-1532).

Ford knew about the agreement between Goodloe and the Petersons because he attended a November 1969 meeting at his office between Goodloe and Peterson (Tr. 1522-1523; GX 163) and around the end of March 1970 told Peterson that Goodloe had the assignments of their interest in the leases and they "had nothing to worry about" so far as that interest was concerned (Tr. 1530-1531). Ford nonetheless rendered a title opinion to Select, dated January 26, 1970, which is silent on the Peterson's interest. In addition, Ford admitted in a 1972 deposition in a suit the Atoka Bank brought against the Petersons on their $20,000 note, that in fact he had prepared the January 26 opinion in late March, specifically for a Select Board of Directors meeting (*infra*, p. 32), and backdated it (Tr. 1534, 1541, 1552-1553).*

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* A copy of this opinion was received in evidence as DFordX F (Tr. 1774-1776). Ford denied at trial having backdated it (Tr. 1777).

(ii) Value

The Petersons' $37,500 investment for a 50 per cent interest in the leases is an important indicium of their value, especially in light of Peterson's M.B.A. from Harvard Business School and M.A. in Geology from the University of Texas (Tr. 1518). Peterson estimated that the "economic value" of that investment was three for one, or that he expected "a possible return" of "$3 to every one invested" (Tr. 1598-1599). On that basis, Peterson's estimate of value for the leases would not exceed $225,000, as compared to the $5 million shown on the balance sheet.

A second indicium of value, also significant in evaluating later public statements Select made about the leases, is Peterson's observation in December 1970 that on viewing the area covered by the leases he found the "remains" of the one well involved, consisting of "some casing or pipe in the surface of the ground" which "had been filled with cement," all the equipment having been removed (Tr. 1533-1534).

9. Segal makes the market for Select stock

Segal did not wait for the January 27 documents before beginning to arrange a manipulated market for Select stock. On January 26, after the Goldfield shares had been locked away, he met with Gardner and co-conspirator Michael Karfunkel ("Karfunkel"), a trader at a New York City over-the-counter brokerage house called Economic Planning Corp. ("Economic Planning") (Tr. 119, 619-620).

Segal and Gardner asked Karfunkel if Economic Planning would be willing to quote for Select stock in the "pink sheets" of the National Quotation Bureau, Inc. ("NQB"), on the understanding that Segal would assume

the trading risks (Tr. 120-121, 620). In their presence and with their assistance, Karfunkel filled out application forms to do so (GX 26 and 26A), but never submitted them to NQB because, as he advised Segal the next day, his superiors at Economic Planning, while willing to trade Select stock if someone else opened the market in it, were unwilling to be the market "opener" themselves (Tr. 121-122, 621-622).

Segal then sought the assistance of co-conspirator Stuart Schiffman ("Schiffman") to open a market for Select stock (Tr. 122, 379-382). At this point Boyd returned to New York with the January 27 documents (GX 1; *supra*, pp. 13-14), and he and Gardner met with some financial public relations people (Tr. 129-131, 384). Segal duplicated the January 27 documents (Tr. 131-132, 145-146; GX 1L) and gave a set to Schiffman (Tr. 383-384; GX 1H).

On February 2, Segal gave Schiffman one of the application forms Karfunkel had filled out (GX 26A) with the request that he pass it to Karen Co. ("Karen"), another New York over-the-counter brokerage house, so it could open the market (Tr. 123, 133-134, 382-383). Schiffman passed this copy, and the January 27 documents (GX 1H), to Karen (Tr. 383, 519), where co-conspirator Joseph Azzerone ("Azzerone"), a trader there, signed and submitted to NQB the application form Schiffman had provided (Tr. 382-383, 384, 511-512, 514-516).

After giving the application form to Schiffman, Segal called Boyd and told him that "by the end of the week the stock would be trading" (Tr. 134). Karen's application to NQB (GX 26A) is dated February 4, and Select was first quoted in the pink sheets on February 6, 1970 (GX 370, 373; Tr. 61-62). Boyd called Segal and complained that the quote was only $10 per share, but Segal reassured him that higher bids would operate to raise the price (Tr. 135).

Trading began February 9, including purchases at $16 and $17 per share by Boyd, Maxson and Brookshire (GX 56, 155, 208, 212, 353), and continued until March 19 (GX 199-263, 312, 353, 370, 373; Tr. 59-65). On February 13, Segal reported to Boyd that the price range of the stock was $15 to $18 (Tr. 158). The trial testimony makes abundantly clear that the market was entirely artificial and was manipulated by Segal through the use of "crossed" and "wash" trades and other illicit devices (Tr. 135-139, 146-157, 159-163, 189-192, 195-196, 227, 261, 379-382, 394-395, 446-447, 595-597; see GX 353 and 370).*

A copy of the confirmation slip for Boyd's February 9 purchase turned up in Goodloe's hands while he was negotiating on Select's behalf with respect to the California lands (Tr. 1191-1192; *infra*, pp. 27-29).

10. Select acquires the Patio Building

Select acquired the Patio Building from Maxson by a written contract (GX 58), purportedly dated and signed January 20, and notarized January 28, 1970 (*id.*, p. 3).** The credible evidence supports the conclusion that in fact the acquisition did not take place until mid-February.

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* In the course of the market manipulation, Segal also used Select stock to collateralize his deficits at brokerage houses (Tr. 138-139) and to secure bank loans from at least one of which he obtained personal financial benefit (Tr. 133, 139-142, 577).

** Like the later deal by which Select agreed to acquire the Grube property (*supra*, pp. 17-18, and p. 17, n. **), there was a contemporaneous side deal here between Maxson and Boyd (GX 59) which provided Maxson with shares of unrestricted Select stock which he had the "right to sell . . . at any time the market price of such stock, per share . . . is under $10.00" and the right to "borrow against . . . hypothecate, mortgage[,] pledge, assign, lien or encumber" whenever he had received "special written consent so to do" from Boyd (*id.*, pars. III and II.2).

On January 30, Boyd told Joiner he was "on the train with Mr. Maxson on the Pateo (*sic*) deal" (Tr. 982). Maxson testified that at about that time Boyd had come to see him at the Patio Building looking to rent office space, and they had agreed on space at a rental of $650 per month (Tr. 1453-1454). Sometime later, Boyd returned and asked Maxson to sell the building, which Maxson agreed to do only for cash or "marketable" stock (Tr. 1454-1455). At Boyd's request, Maxson, on or about February 9, purchased ten shares of Select (Tr. 1455; GX 56, 353). On February 17, Boyd gave Maxson a $650 check for the first month's rent (GX 57), and "a little later after this check was received" Maxson and Boyd, in Weber's presence, discussed and signed the acquisition contract and side deal, back-dated to January 28, falsely notarized by an employee of Maxson's, and filed May 19, 1970 (GX 58, 59 and 66; Tr. 1365-1367, 1457-1458). In mid-February, Boyd told Segal Select "had just moved into the Patio Building" and gave Segal the new telephone number there (Tr. 157-158). Under date of March 3, a letter to Maxson on Ford's letterhead and signed in Goodloe's name states that Maxson's Select stock will be delivered by March 10 (GX 60; Tr. 1459-1463).

11. The cover-up begins

The SEC began its investigation of Select on February 19 or 20, 1970 (Tr. 163-164, 625). Around noon on February 20, Segal, who heard about this from his mother-in-law, Florence Glantz, and from Karfunkel (*ibid.*), tried to call Boyd, Joiner, Bissett and everyone else he could think of at Select including "the Select office at the Pateo (*sic*) Building in Texas" where, however, there was no answer (Tr. 164). Segal finally reached Joiner, and Joiner had Boyd call Segal back (Tr. 165, 991-992). Boyd told Segal that "the SEC got involved" because "some banker had said the wrong thing or blew the

whistle" (Tr. 165). Segal told Boyd Select needed to get a "certified balance sheet" and "all the deeds and the properties and everything in there and appraisals" and Boyd replied that he was "getting everything in order" and "would get back to" Segal (Tr. 166, 992).

a. The falsified due diligence file

Immediately after he learned of the SEC's inquiry, Segal began arrangements to augment the due diligence files the brokers trading Select stock had.

With Rappaport he arranged for the preparation and signing of an agreement by which Select would acquire Rappaport's client, Diamond Bros. Company ("Diamond Bros."), in exchange for Select stock valued at $15 per share (Tr. 167-168). The agreement was prepared the night of February 25, and signed first thing in the morning on February 26 by co-conspirator Fred Sherman ("Sherman"), Diamond Bros.' president (GX 7A; Tr. 175-176, 182, 466, 472-473, 476-477).*

Contemporaneously, Segal and Rappaport prepared an agreement, which Rappaport signed as seller on February 26 at the same time the Diamond Bros. contract was executed by Sherman, for the acquisition by Select of Riverside Hotel in exchange for Select stock valued at $15 per share (GX 8; Tr. 180-182).

The significant thing about the Diamond Bros. and Riverside Hotel contracts is that they value Select stock at $15 per share, are backdated to February 3 and February 4, respectively, and nowhere indicate their actual

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* At Sherman's request, Segal also provided him with 15,000 shares of Select stock which were pledged thereafter to secure Diamond Bros.' indebtedness to its major lender (Tr. 168-169, 467-472, 498-509; GX 360, 361).

dates of execution, thus permitting them to be presented to the SEC as though they had been in the brokers' due diligence files prior to Karen's February 4 application to quote Select in the pink sheets (*supra*, p. 21; see Tr. 390-392). They and a Diamond Bros. Registration Statement which never became effective (GX 7G) were delivered to Azzerone at Karen (Tr. 407-409, 516-517) and Mel Schneiderman ("Schneiderman"), a trader at Edward F. Henderson & Co., which was trading Select at Karen's request (Tr. 446, 450). Azzerone and Schneiderman delivered those documents to the SEC that day and gave knowingly false testimony concerning them (GX 7A and 8A; Tr. 188, 517-519, 454-457).* GX 7A provides the basis for Count 52; GX 8A provides the basis for Count 53. On March 1 in Texas Knisely met Segal in Boyd's presence, and executed the backdated contracts for Select (GX 7F and 8B; Tr. 192-193). Boyd provided them to the SEC in Fort Worth on March 9 (GX 27, p. 14; *infra*, p. 31).

b. The false February 24 stock issuances

The transfer agent's records, provided to the SEC with a letter dated March 12 (GX 10, p. 1), purport to show the issuance of Certificate Nos. 1800-1802, 1804 and 1833 on January 25 (GX 10, p. 16) and Certificate Nos. 1762 through 1799 on February 19 (GX 10, pp. 18-20). These certificates in fact were all issued on February 24, after the SEC investigation had become known to the conspirators.

The 38 names on the February 19 stockholders list were provided to Boyd at his request by Segal, Joiner and

* Other knowingly false testimony, designed to cover up the conspiracy, was given to the SEC in New York by co-conspirator Daniel Anfang, another stock trader (Tr. 595-599), and by Karfunkel (Tr. 626-628).

Chapel on or about February 24 (Tr. 171-174, 993-994, 731-733; GX 21 and 21A). The 423,332 shares purportedly issued on January 25 relate to acquisitions which, the evidence shows, had not been consummated at that time (*supra*, pp. 15-20, 22-23). In addition, the certificate numbers for the shares purportedly issued on January 25 are out of numerical sequence, and Titlow's secretary recalled there was "one time it was out of sequence" at the request of Boyd or Titlow (Tr. 691-692). The February 24 date of issuance is borne out by an analysis of the pertinent certificate numbers, 1800-1802, 1804 and 1833. These are all larger than 1752 through 1761, indisputably issued February 16 (Tr. 396-402, 578-580; GX 10, p. 17, GX 13, pp. 1-2, GX 358), and 1762 through 1799, purportedly issued February 19 (GX 10, pp. 18-20). In addition, 1804, which was "Voided", is the same number as a certificate apparently issued February 24 (GX 10, p. 21), and 1833, which replaced 1804 (*id.*, p. 16), comes in sequence between apparent issuances of February 24 and February 26 (*id.*, pp. 21 and 22).

c. The false February 20 balance sheet

Under date of March 4, 1970, the day after Grube and Boyd signed the Grube property acquisition agreements in Reno (*supra*, pp. 17-18), Barnett forwarded to Select its pro-forma balance sheet as of February 20, 1970 (GX 2), which recites that it is prepared from information furnished by Goodloe "without audit". This false document reflects the same three assets shown on the January 27 balance sheet (*supra*, pp. 15-20), plus the Patio Building, the stock issuance for which it takes into account (*supra*, pp. 15, n. *, 22-23).

Barnett's letter cautions that the statements are "not to be used for credit purposes or securities transactions"

(GX 2, p. 1). Nonetheless, at least one copy was delivered to a bank (GX 21; Tr. 745-746), and Boyd provided a copy to the SEC on March 9 (GX 27, p. 13; Tr. 997-998).

12. Select acquisition activities during the cover-up

During the cover-up, Select was also engaged in negotiations for California land and Economic Management Services, Inc. ("EMS"), which Boyd mentioned to the SEC on March 9, and for property from a man named Stroud, which involved Ford and Goodloe.

a. The California land

On March 2, 1970, deeds purporting to convey to Select 150 sections of land in Riverside and Imperial Counties, California, were delivered to Goodloe and Ford by co-conspirators Hoyt W. L. Brinlee ("Brinlee") and Joan Vinson ("Vinson"). Boyd mentioned this land to the SEC on March 9 (GX 27, p. 26) and it appears as a $25 million Select asset on the balance sheet certified March 28.

Select's negotiations for the California land began in January when Goodloe met Brinlee and Vinson in Dallas and told them that he, Boyd and Joiner were "forming a venture" that might be "mutually beneficial" (Tr. 1187-1188). Goodloe asked Brinlee if he had access to any major tracts of land, and Brinlee replied that he had "an opportunity to obtain some real estate in California" (Tr. 1188). At a second meeting some days later, Brinlee told Goodloe he could obtain land from co-conspirator William H. Davidson ("Davidson") at $100 per acre for Riverside County and $50 per acre for Imperial County, and Goodloe offered to pay for it with Select stock which he said would be "on the market" in the

"pink sheets" (Tr. 1189-1191). At subsequent meeting, Goodloe gave Brinlee and Vinson a copy of the confirmation for Boyd's February 9 purchase of Select stock (Tr. 1191-1192; GX 155). Throughout the meetings, Goodloe asked Brinlee for an appraisal on the land, which Brinlee said he did not have and could not get (Tr. 1190, 1193).

On February 17, 1970, Brinlee and Vinson met with Goodloe and Ford at Ford's office and there signed an agreement (GX 69) to sell to Select, in exchange for its stock, certain land in Imperial County, California, described in an appraisal attached to the agreement (GX 69, pp. 5-8; Tr. 1194-1197). The agreement recites that Brinlee and Vinson are "owners" of the property, but Brinlee testified he had told Goodloe and Ford he had quitclaim deeds only (Tr. 1196, 1197). Brinlee also testified that the appraisal was not attached to the agreement at the time of execution (Tr. 1197), and the jury could infer that Goodloe and Ford obtained it directly from Davidson (see Tr. 1143, 1151-1154; GX 152).

Goodloe and Brinlee met with Davidson and his partner, co-conspirator Grant Kime ("Kime"), on February 21 in Los Angeles, and they and Kime flew over the land. Brinlee then addressed to Ace Associates, Inc., a company owned by Davidson and Kime, a letter (GX 151) covering his acquisition from them of land in Imperial and Riverside Counties in exchange for Select stock (Tr. 1140-1141, 1148-1151, 1199-1202), and Davidson delivered to Brinlee xerox copies of quitclaim deeds for both counties (GX 138A and 147A; Tr. 1152, 1202-1203), keeping the originals against receipt of 50,000 shares of Select stock promised him in the letter as a down-payment (Tr. 1204; GX 151). The purchase price was $50 per acre for Imperial County and $100 per acre for Riverside County land, with a $20 per acre rebate to Brinlee (GX 151; Tr. 1151-1152).

On March 2, when Brinlee and Vinson met with Goodloe and Ford, Goodloe and Ford had the original quitclaim deeds of which Davidson had given Brinlee xerox copies. Nonetheless, Goodloe and Ford asked Brinlee and Vinson to sign warranty deeds which Ford would hold in escrow (Tr. 1205-1206), but in fact filed in April (see GX 29, pp. 126-130, 133-136, 148-152). Brinlee and Vinson signed four such deeds (GX 133, 141, 156 and 157; Tr. 1207-1208, 1213-1214). Two of these purport to convey two sections to Ford (GX 156) and nine sections to Goodloe (GX 157) in Riverside County, for their services to Select in connection with the negotiations (Tr. 1207). The other two deeds purport to convey to Select 61 sections in Riverside County (GX 133) and 89 sections in Imperial County (GX 141). Again, Goodloe and Ford asked Brinlee for an appraisal on the land but received none (Tr. 1214).

These 150 sections were reflected on Select's certified balance sheet (GX 3) at $24,960,000, equivalent to $260 per acre.* In fact, a substantial part of the land does not exist in the United States (Tr. 1334; GX 147A). Almost all of the land which does exist in the United States is owned by the United States (Tr. 1512-1516; GX 136, 137, 138A, 144, 145, 146, 147A, 376, 382, 383, 384, 385). And all of the land is arid desert, just "good to hold the world together" (Tr. 1200; 1142, 1335-1338). None of it is in the Imperial Valley (Tr. 1335).

b. EMS

EMS was a failing Texas company (Tr. 772-774) run by co-conspirators Chapel and Myron O. Bickel ("Bickel"). Beginning in January, Boyd, Chapel and

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* GX 3 lists Select's land at $25,404,500, an increase of $24,960,000 over the $444,500 shown for land in GX 2, the February 20 balance sheet. Each section has 640 acres, totalling 96,000 acres for 150 sections. Valued at $260 per acre, 96,000 acres equals $24,960,000. See GX 30 and 31.

Bickel had discussions looking to an acquisition of EMS by Select in exchange for Select stock valued at $15 per share (Tr. 725-730). After Chapel had given Boyd a list of names for the February 19 stockholders list (*supra*, pp. 25-26), Boyd gave Chapel 3000 shares of Select stock, 2000 of which Chapel and Bickel pledged to secure a February 20 bank loan of $15,400 (Tr. 736-740; GX 270, 271, 272, 273, 294 and 194).*

Activity on the EMS-Select merger then increased, most notably in a computation by Chapel and Bickel of the number of Select shares the EMS shareholders would receive (Tr. 741-742; GX 275). This computation is significant in that it provides the basis on which Chapel and Bickel later on in March created false earnings projections for EMS to support an arbitrary $15 per share price for Select stock (Tr. 749-753; GX 282 and 283).

c. The Stroud property

In February 1970, Joiner formed Imperial National, Inc. ("Imperial National") (GX 83; Tr. 990-991). About February 20, Imperial National and Harold Stroud entered into a contract for the purchase of realty in exchange for Select stock (GX 68; Tr. 992-993). On March 5, in anticipation of closing that exchange, Joiner went to Abilene and picked up from Ford 60,000 Select shares in the name of Goodloe, signing a receipt for them (Tr. 994-995; GX 339A).

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* The loan was also secured by 50,000 shares of United American Industries, Inc., stock in the name of Knisely which he had assigned to EMS (GX 194).

13. The cover-up continues: Boyd goes to the SEC

On March 9, 1970, Boyd, accompanied by Weber as his attorney, appeared voluntarily before the Fort Worth office of the SEC (GX 27) and made under oath the following false statements, among others: Select had 350 to 400 stockholders (*id.*, p. 16); Titlow had had "a majority" of the outstanding stock (*id.*, p. 20); Boyd had paid $40,000 for "about 745,000" shares (*id.*, p. 21); EMS is "a large going business" (*id.*, p. 24); Select had "negotiated successfully for a hundred fifty sections in the Imperial Valley in California" (*id.*, p. 26); the mica mines were "actually producing" about "20 tons per day" which was "profitable to something like on the order of $50 per ton to the company" (*id.*, p. 29); Peat, Marwick & Mitchell had "accepted orally" to do a certified financial statement (*id.*, p. 31); Boyd's 30,000 shares "is old stock that I purchased before" and therefore bears no restrictive legend (*id.*, p. 37); there is "a little more than 300,000" shares "in the hands of the general public" (*id.*, p. 59);* the "only information" Boyd had with respect to a "public market" for Select stock came from brokers in Odessa and Midland, Texas (*id.*, p. 63); Boyd had not placed any shares of Select stock with Alan Segal (*id.*, p. 93) and had never heard of Francini Zahl or Florence Glantz (*id.*, p. 94). Boyd left documents with the SEC (GX 27, pp. 95-97), which were thereafter picked up for him by Chapel's secretary (Tr. 746-747; GX 53).

During the course of his appearance, the SEC warned Boyd that anyone in his group who sells Select stock "will be deemed to be in willful violation of the Federal Securities laws" and in particular the registration requirements (GX 27, p. 89).

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* Having made this statement, Boyd came to New York and retrieved the remaining stock from the safe deposit box (Tr. 196).

14. The March 28 certified financial statements

The next major event was the obtaining of Select's balance sheet as of March 5, and appended financial statements, certified by Barnett under date of March 28, 1970 (GX 3).* The bulk of the work on this statement took place at and after a Select Board of Directors meeting held March 26 at Ford's office.

The meeting was attended by Boyd, Knisely, Ford, Weber, Hanson, Goodloe, Chapel, Maxson, and later by Barnett (Tr. 758, 1464). The various assets of Select were described and evaluated, including the New Mexico mica mines, the Grube property, the Texas oil and gas leases, the Patio Building, the California land, and EMS (Tr. 759-761, 1464-1467).

The upshot of the meeting was Barnett's signature on March 29 of the March 28 certification to Select's Balance Sheet as of March 5 (Tr. 1011-1012; GX 3 and 3C). Barnett relied in part on a telegram purportedly from a real estate appraiser named Marquardt but in fact a forgery (Tr. 1093-1104; GX 30), and on a letter purportedly from another real estate man named Cobb which was also a forgery (Tr. 1376-1380; GX 39, 39A, 39B). The telegram (GX 30) was addressed to Select at Ford's telephone number (see GX 3, p. 1), and the letter was addressed to Barnett "% Robert Ford, Attorney" (GX 39, p. 1).

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* To complete the March chronology, on March 10 Boyd and Joiner signed applications for life insurance from American Founders Life Insurance Company, for which Bickel was an agent (Tr. 747-749, 1000, 1006-1007; GX 281A), and on March 16 Chapel signed at Boyd's request a $28,674.50 note at the Atoka Bank (Tr. 753-755; GX 286 and 269).

The certified financial statements, which were widely distributed (GX 3, 3A, 3C, 3J, 3N, 3"O"), include as Select assets the New Mexico mica mines, the Grube property, the Texas oil and gas leases, the Patio Building, and the California land. These are subject to the title infirmities and overvaluations previously indicated (*supra*, pp. 15-20, 22-23, 27-29).

15. The fraudulent news release and publicity flyer

On March 30, Boyd gave Chapel the new financial statement, and asked Chapel to help prepare a news release (Tr. 761-763, 1015; GX 3N). The news release Chapel prepared (GX 4A) is replete with falsehoods, and is signed by Knisely as Select's president. For example, it states (GX 4A, p. 2) that the mica mines "are now actually producing substantial commercial quantities" of mica, that Select has secured "approximately 93,000 acres of land located in the well-known Imperial Valley of California . . . among the richest and most productive land anywhere in the world", and that EMS is one of the "more potentially profitable of the enterprises under consideration for acquisition". Boyd gave most of this information to Chapel, who acted as amanuensis (Tr. 763-777). This news release was widely distributed, and played an important role in Mullenax's later loans (*infra*, pp. 37-41).

Thereafter Chapel, again at Boyd's request, prepared a three-fold flyer (GX 5), based on the information in the news release with some additions (Tr. 782-784). This, too, was distributed (GX 5, 5A, 5F).

16. April 1970: Restoring the false market in Select stock

The SEC suspended trading in Select stock from April 2 through 11, 1970 (GX 29, pp. 89-90). The SEC's investigation continued thereafter, and the conspirators suborned and committed perjury in it as part of their endeavors to re-establish a false market for Select stock. A short-lived market was established by the end of April, which lasted long enough to enable Mullenax to use it in obtaining a loan on Select stock in early May (*infra*, pp. 38-39).

a. The SEC perjury

Boyd and Ford appeared before the SEC on April 6, at a meeting of which no transcript was prepared (GX 29, pp. 5, 121-122), and delivered to the SEC the March 28 news release signed by Knisely (GX 4B), the March 28 certified balance sheet (GX 3), and other documents.* Boyd testified on the record later in April, as did Knisely, Chapel, Goodloe and Brinlee, but not Mullenax. Ford attended part of Boyd's and all of Goodloe's testimony (GX 29, p. 121; GX 327, p. 4). Each of these witnesses made false statements, and provided fraudulent documents, to the SEC. Chapel and Brinlee testified at trial that they had perjured themselves at the request of Boyd and Goodloe, respectively (Tr. 792-795, 1222-1224).

Knisely, appearing before the SEC on April 16, said that he did not know Alan Segal of New York, even though he had met Segal in Texas six weeks earlier at

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* A memorandum was prepared of this meeting but was not offered as part of the Government's case (GX 28 id). On his cross-examination, Ford said he was sure Boyd had presented the indicated documents to the SEC on that occasion (Tr. 1877-1881).

the time he signed the backdated Diamond Bros. and Riverside Hotel contracts (GX 22, p. 25; see *supra*, p. 25).*

Boyd, appearing the following day, repeated his March 9 falsehoods that he had bought about 750,000 Goldfield shares (instead of 1,156,603) and that there were 300 to 400 public Select shareholders (instead of none) (GX 29, pp. 13-15, 25), and that he did not know Francini (*sic*) Zahl or Florence Glantz and had never been to Segal's office in New York (*id.*, pp. 140, 143), and said in addition, among other things, that Select had started issuing stock at a January 23 Board of Directors meeting (instead of on February 24) (*id.*, p. 32; see *supra*, pp. 25-26).

Chapel, appearing April 21, followed Boyd's instructions and falsely denied having had any previous business association with Boyd, having borrowed money at the Atoka Bank (see *supra*, p. 32, n. *), and having seen Select's letterhead on which the news release he had prepared (GX 4A) was printed (Tr. 793-795).

Goodloe testified on April 22 that he had traded Brinlee 60,000 Select shares for California land, whereas in fact he had given them to Brinlee to use in obtaining a loan (GX 327, p. 35; see Tr. 1218-1219). Ford, whose role in the California land negotiations (see *supra*, pp. 27-29) suggests that he must have known what the deal between Goodloe and Brinlee really was, sat beside Goodloe during this false testimony. Brinlee, at Goodloe's request, testified on April 27 in corroboration of Goodloe's story (Tr. 1222-1224).

Ford, in addition, appeared during Boyd's April 17 testimony and made false statements (not under oath)

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* The jury requested and received during its deliberations a redacted copy of Knisely's testimony, which includes this lie (Tr. 2628, 2637).

concerning the value of and Select's title to the California land (see GX 29, pp. 128, 131, 132, 133-136, 147-148, 150, 159), and delivered to the SEC a January 24, 1970 contract (GX 35) between Goodloe and Select on the Texas oil and gas leases (GX 29, p. 122; see *supra*, p. 19) and a copy (GX 39B) of the forged Cobb appraisal letter (GX 29, p. 123; see *supra*, p. 32).*

b. Restoring the false market

The last trades of Segal's manipulated market took place in mid-March (*supra*, p. 22; GX 353, 370). In late March and on into April, Boyd and Joiner called Segal and Karfunkel in efforts to restart their manipulated market, and sent them the March 28 news release and certified balance sheet (Tr. 202-205, 628-630; GX 3A, 3"O", 4C, 4H, 4I). These efforts were unsuccessful, and the conspirators turned to a different ring of manipulators, working through co-conspirator Virgil Barker ("Barker") (Tr. 1016-1017). In that connection, they changed Select's transfer agent from Titlow's company to Rocky Mountain Securities Transfer Co., Inc. (Tr. 1026-1027; GX 107).

Joiner provided Barker with Select stock in Denver in mid-April (Tr. 1021-1022). Thereafter Joiner spoke to Mel Richards ("Richards"), the owner of Enterprise Investments in Las Vegas (Tr. 1027-1028, 1627), who had been mentioned to him by both Boyd and Barker, and asked him about getting Select stock trading (Tr. 1027). Richards replied that he was attending to it (*ibid.*).

On April 26 in Las Vegas, Richards met Wells, who was then a broker with Crown Trading in New York

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* Ford denied at trial having delivered these documents to the SEC (Tr. 1810, 1817, 1868-1871).

(Tr. 1626), gave him a small due diligence file on Select, and asked him to handle Select stock with Richards assuming the trading risks (Tr. 1626-1628; GX 363). A few days later, Barker called Wells in New York, told him he was recommended by Richards, and asked to buy Select stock at $12 per share (Tr. 1629). Barker thereafter augmented the due diligence file Wells had (Tr. 1629-1639; GX 258, 363).

The weekend of May 2, Wells sent a telegram to Continental General Life Insurance Company in Alabama, with which the jury could find Mullenax was connected (Tr. 1023, 1687-1688; GX 109, 121), stating that the stock would be trading sometime in the coming week, and thereafter made application to list Select in the pink sheets where it appeared on May 5 and 6 at a range of $12 to $15 (Tr. 1634-1635; GX 373). Wells afterwards appeared before the SEC in New York and falsely told them a story of his introduction to Select which omitted the role of Richards (Tr. 1636-1638).

Two hundred shares of the Select stock Joiner had given Barker found their way to Norman Murfield and Bernard Morley of Denver, together with copies of the March 28 news release, the certified financial statement, and the publicity flyer (Tr. 1474-1476, 1480-1482; GX 378, 379, 4K, 5F), and, on or about May 7, Murfield and Morley attempted to sell these shares through Essex Securities in Denver to Crown Trading, Wells' firm in New York, acting for Barker's account (Tr. 1639-1641, 1475, 1481; GX 257, 258, 353).

17. Mullenax's fraudulent loans

Shortly after Joiner left the Select stock certificates with Barker (*supra*, p. 36), he and Boyd met with Mullenax and co-conspirator Donald Rouse ("Rouse") at Select's new offices in Dallas (Tr. 1023). In Mullenax's

presence, Rouse told Boyd and Joiner he could "borrow on some stock through his insurance agency" or "insurance company" (*ibid.*) and Boyd gave Mullenax 40,000 shares of Select, 10,000 in his own name and 30,000 in Joiner's name, together with stock powers executed May 7 and May 8, 1970 (Tr. 1023-1026; GX 105, 107, 110, 111, 122, 123). Mullenax used these certificates and stock powers in connection with loans at State National Bank of Alabama (the "Alabama Bank") (GX 122 and 123), the Home State Bank, MacPherson, Kansas (the "Kansas Bank") (GX 105 and 107), and Town and Country Business Trust, Wichita, Kansas (the "Kansas Trust") (GX 110 and 111).

a. The Alabama Bank

On May 8, 1970, Mullenax, in Rouse's presence, requested Bill Collins ("Collins"), the president of the Alabama Bank, to lend him $60,000 secured by Select stock (Tr. 1647-1649, 1672). Mullenax provided Collins with copies of the Select certified financial statement, March 28 news release, and publicity flyer (GX 3J, 4E and 5; Tr. 1649-1650), and gave Collins a list of brokerage firms which he said were "making a market in Select stock" (Tr. 1650). The brokerage firms listed included Richards' firm in Las Vegas and Wells' firm in New York (GX 121). In addition, Mullenax gave Collins a personal financial statement which showed his net worth at April 30, 1970 as $557,484.00 (GX 120; Tr. 1651-1652).

After checking Select out through a brokerage firm in the bank building, Collins again met Mullenax who suggested he call Wells' firm in New York (Tr. 1661-1663). Collins called Wells, who told him the stock was trading around $12 but could not be sold in large quantities, and then made the $60,000 loan, secured by Select stock, to Mullenax (Tr. 1663-1666; GX 125).

Mullenax put up 20,000 Select shares, 10,000 of which secured the $60,000 loan and 10,000 of which provided further security for an outstanding loan to Joint Talent Group, Incorporated (Tr. 1674-1675; GX 122, 123, 125, 126). In addition, from the $57,600 loan proceeds deposited in his account at the Alabama Bank (GX 125), Mullenax drew a $25,480 check to Rouse (GX 305) to pay off a $20,000 indebtedness to the Alabama Bank of Ray Lewis, whom Collins described as an "associate of the same company that Mr. Mullenax was representing" (Tr. 1675-1676). Of particular significance, Mullenax also drew $25,000 from that account and transferred it to East Side National Bank, Wichita, Kansas (the "East Side Bank"), where it was deposited to his account on May 18 (GX 125, 127, 309; Tr. 1676-1680, 1369-1372).

On May 18, Mullenax drew a $4,000 check on his account at the East Side Bank to Chapel (GX 294-A), who transferred $3,000 to his own account in Fort Worth (GX 295) and gave $1,000 in cash to Joiner (Tr. 799-802). At an earlier meeting with Boyd and Mullenax, Chapel had asked for money and "Boyd told Ernie Mullenax to give me $4,000" (Tr. 797-798).*

b. The Kansas Bank

The evening of May 8, after completing the $60,000 loan at the Alabama Bank, Mullenax went to Wichita from which he telephoned Richard D. Nichols ("Nichols"), president of the Kansas Bank, to which he then owed approximately $43,000 (Tr. 1287-1289). Mullenax told Nichols he had "succeeded in selling a substantial amount of an investment" and offered to bring as additional col-

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* On May 18, Mullenax also borrowed an additional $5,000 from the Alabama Bank, without giving further security (GX 128; Tr. 1681).

lateral 10,000 shares of Select stock which he said was trading over-the-counter "around $10 to $12 per share" (Tr. 1289-1290).

The following morning, Saturday, May 9, Mullenax met with Nichols and the bank's attorney, delivered 10,000 Select shares with attached powers (GX 105, 106, 107), as well as the Select news release and publicity flyer (GX 4D and 5A), and had further conversation with them concerning Select (Tr. 1290-1295). Mullenax correctly identified Select's new transfer agent and wrote its name on the back of Joiner's stock power (GX 107; Tr. 1291-1292, 1296), gave Nichols a written list of five brokers "where this stock was being traded" including, again, Richards' firm and Wells' firm (GX 4D; Tr. 1295-1296), and repeated what he had told Nichols over the telephone the previous evening (Tr. 1295). Mullenax also gave the Kansas Bank $1,000 of the money he had borrowed from the Alabama Bank the preceding day (GX 386).

c. The Kansas Trust

On July 1, 1970, Mullenax met with Paul Mann ("Mann"), a trustee of the Kansas Trust, and sought a $25,000 loan secured by Pig N'Whistle stock and Select stock (Tr. 1605-1606, 1609-1610). Mullenax provided Mann with a personal financial statement which showed his net worth at May 1, 1970 as $1,306,386.00 (GX 109; Tr. 1606), which is to be compared with the $557,484.00 he represented to Collins to have been his net worth at April 30 (*supra*, p. 38). The financial statement lists $480,000 worth of Select at $12, equivalent to the 40,000 shares Mullenax had previously gotten from Boyd (*supra*, p. 38); Mann asked Mullenax what business Select was engaged in, to which Mullenax replied "real estate and mining" (Tr. 1609).

The Kansas Trust lent Mullenax $25,000 on July 1, secured by 40,000 shares of Pig N'Whistle stock and 2,000 shares of Select stock (GX 110, 111, 112, 113, 114, 115; Tr. 1609-1611) * and disbursed by two checks (GX 116; Tr. 1615-1616), one of which, in the amount of $22,100, was deposited in Mullenax's account at the East Side Bank on July 2 (GX 296, p. 1). Also on July 1, Mullenax's wife drew a $9,000 check to Joiner on that account (GX 296A), which Mullenax took to Joiner in Dallas pursuant to an agreement between them (Tr. 1029). Joiner and Boyd gave that check (GX 296A) to Chapel, who at their request returned to Wichita and exchanged it for a cashier's check which he returned to them in Dallas (Tr. 802, 805-808, 1029).

C. The Defendant's Case

Only Ford and Barnett presented evidence in defense (Tr. 1766, 2024-2026). Each testified in his own behalf. In addition, Barnett called three character witnesses (Tr. 2035-2036, 2038, 2187-2188).

1. Ford's defense

Ford, a member of the Texas bar for 26 and one-half years, in substance denied all wrongdoing (Tr. 1766-1819, 1821-1843). He admitted having prepared the January 23 conveyances of the Texas oil and gas leases and the New Mexico mica mines, and the January 26 opinion letters in respect thereof, asserting that these had been prepared at Goodloe's request at the dates indicated on them, respectively, rather than later and backdated as he had testified in 1972 (Tr. 1769-1777, 1837; DFordX E and F; see *supra*, pp. 15-16, 18-19). He asserted he had first learned of the Petersons' interest in the Texas oil and

* Subsequently, the Kansas Trust took an additional 8,000 Select shares as further security for this loan (Tr. 1617-1618; GX 119).

gas leases in May 1971 and had not had any conversation with them in 1970 concerning that interest (Tr. 1831-1835). He admitted drawing the California land contract Brinlee signed February 17 (GX 69) but denied attaching Exhibit A thereto (Tr. 1779-1781), and also admitted the March 2 meeting with Brinlee and Vinson (Tr. 1781-1789 and DFordX A). He asserted that Goodloe had traded Brinlee 60,000 Select shares for 11 sections in Riverside County, as Goodloe and Brinlee had falsely told the SEC (Tr. 1789; see *supra*, p. 35). Ford denied having done any work for Select from March 2 through 26, but admitted that the March 26 Board of Directors meeting had been held in his conference room (Tr. 1791-1794). He denied working on any Select balance sheet, but said his secretary had probably given Barnett copies of his opinions dated January 26 (Tr. 1795-1799). He went to the SEC at Boyd's request on April 8 or 9 and again on April 17 (Tr. 1809-1817), and was relieved as Select's counsel at the end of the April 17 hearing (Tr. 1818) even though he appeared thereafter with Goodloe and Barnett (Tr. 1822). He denied having brought to the SEC the documents its transcript recites he did (Tr. 1810, 1817; see *supra*, pp. 35-36). Between the two SEC appearances, Ford went to California at Boyd's request, had the California land deeds re-notarized and recorded, and viewed the land involved (Tr. 1800-1808). He had no recollection of dictating the letter transmitting the March 28 certified financial statements to Grube (GX 3), but thought the signature looked like his secretary's (Tr. 1827-1828).

2. Barnett's defense

Barnett, a certified public accountant for 18 years, also in substance denied all wrongdoing (Tr. 2039-2186). He prepared for Goodloe, to whom Ford had introduced him in 1969, the January 20 pro-forma C. A. Morris

balance sheet (GX 1G; Tr. 2050-2053). He thereafter prepared the pro-forma Select balance sheet as of February 20, 1970 (GX 2) at Goodloe's request and with his information, and almost immediately upon the completion of that statement began an audit of Select (Tr. 2053-2062). In that audit, he was provided information by Goodloe, Ford and Boyd, including documentation, and learned nothing which would have prevented his giving an accountant's certification (Tr. 2062-2095).

ARGUMENT

POINT I

The jury properly found all appellants guilty of the single conspiracy charged and proven.

Boyd and Ford assert that the evidence showed multiple conspiracies (Boyd Br., pp. 7-9; Ford Br., pp. 17-24),* and that Judge Pollack's charge on that subject was deficient. Each of the appellants asserts that the evidence against him was insufficient. The arguments are uniformly without merit.

A. The indictment charged and the evidence proved a single conspiracy

There was clearly no variance here between what the indictment charged and what the evidence established. The contention, therefore, is that the indictment charged and the proof established multiple conspiracies (see Ford Br., pp. 17-24). That is simply not so.

The indictment here "alleged a single conspiracy . . . to sell unregistered securities and to defraud. . . . The

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* Citations to "Br." are to the briefs of the indicated appellants, respectively.

fraudulent acts and the unlawful failure to register information which would uncover them were essential steps in a single scheme to dupe". *United States* v. *Benjamin*, 328 F.2d 854, 864 (2d Cir.), *cert. denied sub nom. Howard* v. *United States*, 377 U.S. 953 (1964); see *United States* v. *Colasurdo*, 453 F.2d 585, 591-592 (2d Cir. 1971), *cert. denied*, 406 U.S. 917 (1972).

The more recent cases are in accord. *United States* v. *Blitz*, Dkt. No. 75-1237 (2d Cir. March 25, 1976), slip op. 2761; *United States* v. *Gentile*, Dkt. No. 75-1283 (2d Cir. Feb. 10, 1976), slip op. 1851, 1855-1858; *United States* v. *Finkelstein*, 526 F.2d 517, 521-522 (2d Cir. 1975). Indeed, *Finkelstein* is an *a fortiori* case, for there a single conspiracy was found even though the western conspirators had violated their agreement not to sell shares because there was a "unifying purpose—namely bilking the public by foisting worthless stock upon it" (526 F.2d at 521). Everything the conspirators did here was in furtherance of that unifying purpose. See *United States* v. *Bernstein*, Dkt. No. 74-2328 (2d Cir. March 4, 1976), slip op. 6631, 6656-6662; *United States* v. *Stofsky*, 527 F.2d 237, 248 (2d Cir. 1975). On its facts, *United States* v. *Bertolotti*, Dkt. No. 75-1107 (2d Cir. Nov. 10, 1975), slip op. 6409, has nothing to do with whether a single conspiracy was alleged and proved here.

B. All the appellants participated in the single conspiracy and there is ample evidence to support their convictions

The evidence here shows not only a unity of purpose in accomplishing the integrated financial fraud charged and proven, but also that all the appellants were closely interrelated in that fraud as a matter of fact. As to each appellant, there is more than enough evidence for a reasonable juror to find guilt beyond a reasonable doubt. *United States* v. *Taylor*, 464 F.2d 240 (2d Cir. 1972).

Shortly after Boyd agreed with Titlow on January 13 (*supra*, p. 8), he met with Weber, Goodloe and Ford to discuss Select (Tr. 1769-1770).* The January 22 Select stock issuance included shares to Knisely and Goodloe, as well as Boyd (*supra*, pp. 9-10). The January 27 Balance Sheet included two overvalued "assets" obtained by Goodloe and Ford and one obtained by Boyd (*supra*, pp. 15-20), a pattern which continued with the February 20 and March 28 Balance Sheets (*supra*, pp. 26-27 and p. 32). Knisely, the front man as Select's president, signed the fraudulent report which accompanied the January 27 Balance Sheet (*supra*, pp. 13, 15). Those fraudulent documents provided part of the basis for the manipulated market in Select stock (*supra*, p. 14). Knisely's execution of the backdated January 23 minutes (*supra*, p. 11) and Ford's preparation and his and Goodloe's execution of backdated conveyances and title opinions to support the fraudulent January 27 Balance Sheet, (*supra*, pp. 16, 19) compels an inference that they knew of the false market activities. That inference finds further support in Goodloe's use, during the California land negotiations in which he and Ford were both intimately involved, of the confirmation slip for Boyd's February 9 Select stock purchase (*supra*, pp. 22, 28). Knisely's execution of the backdated Diamond Bros., Riverside Hotel and Grube contracts (*supra*, pp. 25, 17) supported both the January 27 balance sheet and Select's $15 per share price in New York. Boyd, Knisely, Goodloe and Ford all attended the March 26 meeting at Ford's office in Abilene, where all the assets fraudulently displayed in the March 28 Balance Sheet were described and evaluated (*supra*, pp. 32-33). Boyd, Ford and Goodloe all provided Barnett with false information which that Balance Sheet displayed, including the forged Marquardt telegram and Cobb letter both addressed to Ford (*supra*, pp. 32, 43). Knisely thereafter signed the fraudulent March 28 news

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* This fact appears from Ford's direct testimony, and was not controverted by any defendant.

release (*supra*, p. 33) and falsely told the SEC he did not know Segal (*supra*, pp. 34-35 and p. 35 n.*). Ford appeared at the SEC with Boyd twice, and with Goodloe and Barnett, and not only heard false testimony given by others but also made false statements and provided fraudulent documents himself (*supra*, pp. 34-36). Mullenax, who entered the conspiracy in April, served as front man in obtaining $90,000 in loans from banks secured by the fraudulently inflated Select stock (*supra*, pp. 37-41).

C. The Court's charge was entirely proper

The multiple conspiracy charge Judge Pollack gave (A. 870-871) includes *in haec verba* the charge upheld as "clear, correct and within the decided cases" in *United States* v. *Tramunti*, 513 F.2d 1087, 1107 (2d Cir. 1975), which Ford does not cite. Nothing in *United States* v. *Cohen*, 518 F.2d 727 (2d Cir. 1975), on which Ford relies, changes that.

Ford therefore argues that the charge is deficient because it does not require an acquittal "if all of the activities specifically charged in the conspiracy count of the indictment are shown, in fact, to have been a conglomeration of separate conspiracies" (Br., p. 27). Stated that way, the argument must fail because its major premise is false (*supra*, pp. 43-44).

Ford's citation of *United States* v. *Natelli*, 527 F.2d 311, 324-325 (2d Cir. 1975), however, suggests a somewhat different argument is intended, that the charge is impermissibly "all or nothing" as in *United States* v. *Kelly*, 349 F.2d 720, 757-758 (2d Cir. 1965), *cert. denied*, 384 U.S. 947 (1966); see *United States* v. *Bernstein*, *supra*, slip op. at 6660-6661. Clearly, however, that argument, too, must fail, both because the jury could permissibly have found that Ford's agreement embraced all facets of the conspiracy and because, in any event, the

Court's charge appropriately focused the jury's attention on the scope of the agreement made by Ford (see Ford Br., p. 27). See *United States* v. *Borelli*, 336 F.2d 376 (2d Cir. 1964), *cert. denied sub nom. Cinquegrano* v. *United States*, 379 U.S. 960 (1965).

Ford makes the further argument that the charge on venue was improper (Br., pp. 28-29). Assuming without conceding that the point was preserved (see *ibid.*, and p. 29 n.*), it is without merit. One conspiracy was charged and proved (*supra*, pp. 43-44); the charge on the essential element of an overt act (A. 871-876) adequately apprised the jury that the Government must prove "the commission by any co-conspirator of at least any one of the acts in the Southern District of New York" (A. 872).

POINT II

Appellants' other points are also without merit.

The other points made by various of the appellants are also without merit.

A. The pledge transactions are sales for purposes of the Securities Act

Boyd and Mullenax (Br., pp. 41-46) argue that the pledge of securities is not a sale for purposes of Sections 5 and 17 of the Securities Act of 1933, 15 U.S.C. §§ 77e and 77q, relying on *McClure* v. *First National Bank of Lubbock*, 497 F.2d 490 (5th Cir. 1974), *cert. denied*, 420 U.S. 930 (1975). That is not the law in this Circuit. *United States* v. *Gentile*, Dkt. No. 75-1283 (2d Cir. Feb. 10, 1976), slip op. 1851, 1858-1860.*

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* Mullenax also argues (Br., p. 41, n.**) that his transactions are exempted by 15 U.S.C. § 77d. This is equally without merit. So far as concerns the transactions in which he personally participated, he would be deemed an "issuer" because part of a

[Footnote continued on following page]

B. It was not error for the Court not to charge on exemption from registration

Boyd argues (Br., p. 6) that it was error for Judge Pollack not to have instructed the jury explicitly on the claim that Select securities were exempt from registration under the Securities Act. The argument is without merit.

No defendant introduced evidence to provide a predicate for an exemption argument, nor did any of the Government's witnesses provide such a predicate. No defendant made any exemption argument either in opening or in summation.* No defendant timely requested any charge on the so-called grandfather clause exemption provided by Section 3(a)(1) of the Securities Act, 15 U.S.C. § 77c(a)(1), or any other sort of exemption (A. 900, 906-907), and no such charge was given (see A. 889-890, 900, 911-913, 915, 938-941, 969-975).

Such a charge would have been inappropriate in any event, not only because of the absence of an evidentiary predicate but also because the evidence made clear that a "new offering" of Select stock was in progress to which the statute provides the exemption "shall not apply", 15

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control group. *E.g., Andrews* v. *Blue*, 489 F.2d 367, 373-374 (10th Cir. 1973). For the transactions in which he did not personally participate, the active participant would be an "issuer" on the same theory, and Mullenax would be liable either as an aider and abettor or under the *Pinkerton* theory, *Pinkerton* v. *United States*, 328 U.S. 640 (1946), both of which were charged to the jury (A. 877-879). See *United States* v. *Blitz*, Dkt. No. 75-1237 (2d Cir. March 25, 1976), slip op. 2761, 2786 and n.40.

* Counsel for Boyd (Tr. 27) and for Titlow (Tr. 43) made reference to shell corporations in opening, and counsel for Boyd repeated the reference in summation (Tr. 2275-2276)—the thrust of the argument in each instance being that there is nothing intrinsically illegal about shell corporations. Counsel for Bissett reminded the jury that Bissett's opinion letter (GX 6) had "nothing to do with any opinion" that Select stock "is exempt" (Tr. 2453-2454), which seems to be the only time the word "exempt" was used in any summation.

U.S.C. § 77c(a)(1), *see United States* v. *Schwenoha*, 383 F.2d 395, 396 (2d Cir. 1967), *cert. denied*, 390 U.S. 904 (1968).

Beyond that, the short answer to the argument is that requests to charge shall be made "[a]t the close of the evidence or at such earlier time during the trial as the court reasonably directs" Rule 30, F. R. Cr. P., and the Court has discretion to deny a charge first requested, as here, after the completion of its instructions to the jury. *United States* v. *Salas*, 387 F.2d 121, 122 (2d Cir. 1967), *cert. denied*, 393 U.S. 863 (1968). And it is "elementary that to put a trial court in error for declining to grant a requested charge, the proffered instructions must be accurate in every respect." *United States* v. *Leonard*, 524 F.2d 1076, 1084 (2d Cir. 1975). Here the request was, as Judge Pollack rightly said, "incomprehensible" (Tr. 2577).*

C. It was not error for the Court of give the jury copies of the statutes referred to in the conspiracy count

One hour and ten minutes after the jury retired (A. 916, 919), its first note requested the statutes referred to in the conspiracy count, namely, 18 U.S.C. §§ 1001, 1341, and 1343, and 15 U.S.C. §§ 77e, 77q and 77x. The

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* Boyd's Supplemental Request No. 2 (Court Exhibit 50B id) reads:

> "Stock issued before the 33 Act as here is exempt from registration only if it is a security which prior to or w/in 60 days after May 27 '33 has been sold or disposed of by the issuer or bona fide offered to the public 'but this exemption shall not apply to any new offering of any such security by an issuer or underwriter subsequent to such 60 days[']. It is understood that the purported sale of Select stock to the public was a new offering and the defendants can be considered as issuers or underwriters in which event registration would be necessary."

Boyd cited *Schwenoha*, *supra*, and *SEC* v. *Culpepper*, 270 F.2d 241 (2d Cir. 1959), in support of this request.

Court provided copies of these as originally read in its charge on that count (A. 864-867, 923). Mullenax argues (Br., pp. 17-23; A. 921) that he was prejudiced because the Court did not contemporaneously repeat the instructions on knowledge, wilfulness and intent given during its original charge on the substantive counts (A. 882-885, 887, 888-890).

It is perfectly obvious that Mullenax suffered no prejudice, and no case he cites suggests the contrary. No defendant was "stripped of [his] sole defense" or subjected to conviction as a "foregone conclusion" as in *Bland* v. *United States*, 299 F.2d 105, 109 (5th Cir. 1962), on which Mullenax relies. The jury acquitted Mullenax of two counts, and acquitted seven of twelve defendants. Beyond that, the jury obviously asked for the statutes at the start of their deliberations in connection with their consideration of the conspiracy count and not the substantive counts, and had reread to them a full charge on some of the substantive counts a day later before they returned any conviction on any count (A. 972-975).

D. It was not error to designate exhibits to the jury

When the jury had turned to the substantive counts, it sent in a note requesting "the exhibit numbers of" those counts (A. 951). In response, the Court designated various exhibits by number, giving defense counsel an opportunity to augment the list (A. 967). Mullenax argues (Br., pp. 24-29) that this impermissibly intruded on the jury's exclusive province to determine the facts.

The propriety of Judge Pollack's conduct, particularly in a case with as many documents as this one, is supported by his authority to marshal evidence and respond to jury inquiries as his discretion dictates. Compare

United States v. *Bernstein*, Dkt. No. 74-2328 (2d Cir. March 4, 1976), slip op. 6631, 6672, where this Court noted with approval a district judge's determination to highlight for the jury certain allegedly false statements contained in a number of government exhibits by circling those statements in red. Here Judge Pollack had, of course, instructed the jury that the facts were their exclusive province (A. 844-845; Mullenax Br., p. 25). Even if it could be argued that the jury had somehow forgotten what their deliberations were about, no request to remind them was made; nor does Mullenax suggest any additional exhibit which should have been designated or argue that the exhibits actually designated were factually unconnected to the counts indicated.

E. Exhibit 296A was properly admitted and Mullenax's proposed charges properly refused

Mullenax argues that GX 296A, the $9,000 check to Joiner drawn on the joint account of Mullenax and his wife against the proceeds of the $25,000 July 1 loan Mullenax obtained from the Kansas Trust, should have been excluded because it was inadequately connected to his use of Select stock (Br., pp. 30-37). Alternatively, he claims error in the Court's refusal to charge as requested in his supplemental requests (A. 718-721; Br., pp. 37-40). The arguments are frivolous.

Mann of the Kansas Trust lent Mullenax $25,000 in reliance on Mullenax's May 1 financial statement which lists the 40,000 Select shares Boyd had given him in April (*supra*, pp. 38, 40-41). Mann took 2,000 (later increased to 10,000) Select shares as part of the security for this loan, and received from Mullenax a fraudulent description of Select's business (*supra*, p. 41 and n.*). In light of this and the other evidence, the jury could properly have found that the $9,000 Mullenax check to Joiner represented the latter's share of the loan proceeds obtained, in

part, by Mullenax's fraudulent use of Select stock and fraudulent statements concerning Select.

The material Mullenax requested in his supplemental requests (regarding the requisite criminal intent and knowledge) was adequately covered elsewhere in the Court's charge. See *United States* v. *Verra*, 301 F.2d 381, 382 (2d Cir. 1962); *United States* v. *Arrow Packing Corp.*, 153 F.2d 669, 671 (2d Cir.), *cert. denied*, 327 U.S. 805 (1946).

F. Mullenax's *Kastigar* arguments have no merit

Mullenax repeats here the arguments he made below deriving from *Kastigar* v. *United States*, 406 U.S. 441 (1972), and asserts their denial without a hearing was error (Br., pp. 47-59; A. 145-215). Seeking to circumvent Judge Pollack's comprehensive opinion (A. 208-215), he now argues that a hearing and attendant inspection of grand jury minutes is necessary for two purported reasons stated in his brief (pp. 58-59, n.*) but not raised below. Neither reason is sufficient to require a hearing. As to the first, Judge Pollack reviewed the grand jury evidence and stated that he "cannot find any part of this evidence which might not have been derived from the independent and legitimate sources described in the government affidavits" (A. 215). As to the second, the means by which the prosecution obtained a copy of Mullenax's bankruptcy testimony is irrelevant in light of the sworn proof that it was never read.*

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* Mullenax's argument that there was insufficient evidence before the Grand Jury is belied by his own brief (pp. 50-51), and, in any event, ". . . an indictment valid on its face is not subject to challenge on the ground that the grand jury acted on the basis of inadequate or incompetent evidence. . . ." *United States* v. *Calandra*, 414 U.S. 338, 345 (1974); *United States* v. *Blitz*, Dkt. No. 75-1237 (2d Cir. March 25, 1976), slip op. 2761, 2792.

G. Boyd's other points are without merit

Boyd makes three further frivolous points. First, he challenges the veracity of various of the witnesses (Br., pp. 20-26), as to which the jury's verdict is conclusive. *United States* v. *Koss*, 506 F.2d 1103, 1111 (2d Cir. 1974), *cert. denied*, 421 U.S. 911 (1975). Second, he argues that his trial counsel was incompetent, which even a cursory reading of the transcript conclusively refutes. Third, he asserts that a miscellany of claimed governmental "illegal acts" requires reversal (Br., pp. 11-26). None of these claimed acts, which are imagined and misrepresented, relates to the trial itself, and so far as we can tell none of them was raised below. Accordingly, we do not deem it necessary to respond to them further. Likewise, no response is necessary to Boyd's other argumentation and recital *dehors* the record (Br., pp. 1-5, 9).

H. Goodloe's sentence was proper

Goodloe argues (Br., pp. 20-22) that his "sentence was improperly increased" because Judge Pollack "based his sentence decision" in part on Goodloe's SEC perjury (*id.*, p. 22).

It is true that Judge Pollack said at sentence that Goodloe had perjured himself before the SEC (Minutes, December 2, 1975, p. 5, not reproduced in Goodloe's Appendix), but it does not follow that this was one of the "factors upon which he based his sentence decision" as Goodloe argues. *Cf. United States* v. *Hendrix*, 505 F.2d 1233, 1235 (2d Cir. 1974). Rather, the Judge's statement seems clearly directed towards describing Goodloe's conduct during the conspiracy, as evidenced by the proof at trial (see *supra*, pp. 34-35). As Goodloe's sentence is the same as those of Boyd and Ford, with whom Goodloe, the evidence showed, was a prime mover of the

conspiracy, it is highly dubious that Goodloe's SEC perjury operated to increase his sentence. But even if it had, there was no violation of *Hendrix*.

I. Ford's motion for severance was properly denied

Ford argues at length (Br., pp. 11-17) that his case should have been severed from those of the other defendants. There is no merit to the argument.

Ford's role was central to the conspiracy, and extended from January to at least the end of April 1970 (*supra*, pp. 45-46). Clearly, there is no prejudice shown and there was no abuse of discretion in denying him a severance. *See United States* v. *Blitz, supra*, slip op. at 2790-2792; *United States* v. *Bernstein, supra*, slip op. at 6651-6653; *United States* v. *Fantuzzi*, 463 F.2d 683, 687 (2d Cir. 1972). It is immaterial that Brookshire's case was severed before trial, particularly in light of the Government's pre-trial statement that Brookshire's position was different from that of the other defendants because the Government had no "proof showing [Brookshire's] involvement after mid-March 1970" (MacDonald aff., July 18, 1975, par. 7), only half-way through the six-month period of maximum conspiratorial activity.

CONCLUSION

The judgments of conviction should be affirmed.

Respectfully submitted,

ROBERT B. FISKE, JR.,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

HOWARD S. SUSSMAN,
JOHN C. SABETTA,
Assistant United States Attorneys, Of Counsel.

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

Mildred Rothenberg ~~JOHN C. SABETTA,~~ being duly sworn, deposes and says that She is employed in the office of the United States Attorney for the Southern District of New York.

That on the 2nd day of April, 1976, She served ~~a~~ cop~~y~~ies of the within brief by placing the same in ~~a~~ properly postpaid franked envelopes addressed~~x~~, respectively:

1) Joe Truman Boyd, Box 5385, Midland, Texas 79701
2) Michael P. Stokamer, Esq., 100 Church Street, New York, N.Y. 10007
3) Henry J. Boitel, Esq., 233 Broadway, New York, N.Y. 10007
4) Rosenberg, Rosenberg & Rockman, 200 Garden City Plaza, Garden City, N.Y. 11530
5) Armende Lesser, Esq., 475 Fifth Avenue, New York, N.Y. 10017

And deponent further says that he sealed the said envelopes and placed the same in the mail box for mailing at One St. Andrew's Plaza, Borough of Manhattan, City of New York.

Mildred Rothenberg

Sworn to before me this

2d day of April, 1976

Jeanette Ann Grayeb

JEANETTE ANN GRAYEB
Notary Public, State of New York
No. 24-1541575
Qualified in Kings County
Commission Expires March 30, 1977